



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNSD, MNDC, MNRFF

Introduction

This Dispute Resolution hearing was convened to deal with an Application by the tenant for the return of the security deposit under the Act and moving costs in damages. The hearing was also convened to hear a cross application by the landlord for a monetary order for loss of rent and cleaning costs.

Both the landlord and a representative of the tenant were present and gave testimony in turn.

Issues to be Decided for the Tenant's Application

The tenant was seeking to receive a monetary order and the issue to be determined based on the testimony and the evidence is whether the tenant is entitled to the return of the security deposit pursuant to section 38 of the Act and whether the tenant is entitled to be compensated for moving costs.

Issues to be Decided for the Landlord's Application

The landlord was seeking to receive a monetary order for loss of rent and cleaning and the issue to be determined based on the testimony and the evidence is whether the landlord is entitled to monetary compensation under section 67 of the *Act*.

Preliminary Issue: Evidence

The tenant's evidence was received by Residential Tenancy Branch. However, the landlord testified that this same evidence was never served on the landlord by the tenant. The tenant referred to a proof of service form that featured a signature allegedly from an agent of the landlord confirming that the evidence was personally served to the landlord by the tenant on May 4, 2011. However this individual was not present to verify their signature and confirm that the evidence was received.

The landlord also submitted evidence to the Residential Tenancy Branch and included documentary proof of service that the evidence was sent to the tenant by registered mail. However, the tenant's representative claimed that no evidence was received. The

tenant testified that the address where the mail was sent only referred to the unit as “Basement” and did not specify that it be delivered to “Basement 2”. The tenant’s representative stated that, as a result of this error, when the hearing package was finally received it was already opened and the landlord’s additional evidence package was never received at all.

In response, the landlord pointed out that the address where the evidence had been sent was actually provided by the tenant, and was, in fact, the identical address that the tenant had put on the tenant’s application for dispute resolution.

Residential Tenancy Rules of Procedure, Rule 3, requires that the applicant must submit evidence to the Residential Tenancy Office and serve all evidence being relied upon to the respondent at the same time as the application is filed if possible or at least (5) days before the dispute resolution proceeding.

Residential Tenancy Rules of Procedure, Rule 4.1 states that, if the respondent intends to dispute the application, copies of all available documents, photographs, video or audio tape evidence the respondent intends to rely upon as evidence at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute

I find that, although the tenant’s evidence was found in the Dispute Resolution file, it appears that none of this evidence had ever reached the landlord. Therefore the tenant’s evidence was not accepted and the tenant was permitted to provide verbal testimony based on the evidence.

With respect to the landlord’s evidence, I accept that the burden of proof has been met to establish that the landlord’s evidence was properly served on the tenant by registered mail to the address provided by the tenant.

Background and Evidence: Landlord’s Claim

The tenancy began on January 1, 2008 and current rent was \$730.00 per month. A security deposit of \$362.50 was paid. According to the landlord, the tenant moved out without written notice on April 3, 2011 and returned the keys on April 8, 2011. The landlord testified that the first and only written notification was provided by the tenant on April 8, 2011 at the move-out inspection. The landlord submitted a copy of this April 8, 2011 note which was signed by the tenant. The landlord testified that the note indicated that the tenant had decided to move out because of alleged problems caused by another tenant smoking inside the building, and the note also stated that she had vacated as of April 3, 2011. The landlord pointed out that nothing in the communication made any reference to a prior written notice to end tenancy.

The landlord stated that, despite a documented request cautioning that the tenant must provide written notice under the Act, the tenant did not do so. A copy of this communication was in evidence. The landlord stated that the tenant's failure to give proper notice resulted in a loss of one month rent for April in the amount of \$730.00 and a partial amount of \$188.40 loss of rent for May 2011 which is being claimed.

The landlord is also claiming \$100.00 in cleaning costs. A move-in condition inspection report was submitted. No move-out condition inspection report was completed, but the landlord submitted photos of the cupboards, floors and stove showing that these areas had not been left in a reasonably clean state.

According to the tenant's representative, the tenant actually moved out at the end of March after giving proper written notice to move on February 28, 2011. The tenant read the notice below into evidence:

"I have requested to you previously, but unfortunately, no action has been taken despite my complaints. People are still smoking inside. I would have no choice left other than to move out. Please consider this as my formal notice to move out. You have even failed to post the no smoking signs on the building."
(reproduced as written)

The tenant's position is that the landlord is not entitled to be compensated for loss of rent because adequate written Notice was given in compliance with the Act. The landlord denied ever receiving the above notice.

The tenant also disputed the landlord's testimony and evidence that the unit was left in an unclean condition. The tenant stated that the landlord's failure to complete the move-out condition inspection report extinguished the landlord's right to claim cleaning costs against the security deposit.

Background and Evidence: Tenant's Claim

The tenant is seeking \$200.00 in moving costs based on the allegation that the tenant was forced to move out due to the landlord's failure to address second-hand smoke caused by another tenant smoking on the premises. The tenant testified that serious health concerns made the matter urgent.

The tenant referred to written complaints allegedly sent to the landlord demanding intervention with this problem over a period of time beginning in 2008. According to the tenant, they had no choice but to move due to the landlord's inaction and the landlord should therefore compensate the tenant for moving costs.

The landlord stated that none of the alleged complaint letters being referred to by the tenant were found to be in the tenant's records. The landlord disagreed with the \$200.00 claim.

Analysis – Landlord's Monetary Claim

With respect to the loss of rent and cleaning costs being claimed by the landlord, an Applicant's right to claim damages from another party is covered by section 7 of the Act which states that if a landlord or tenant fails to comply with the Act, the regulations or tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under the circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant, that being the landlord.

I find that a comparison of the unit's condition before the tenancy began with the condition of the unit after the tenancy ended is essential to establish whether a unit has been damaged and this is best proven through move-in and move-out condition inspection reports containing both party's signatures. Sections 23 and 35 of the Act require that the landlord complete move-in and move out condition inspections with the tenant and document all condition issues on a report signed by both parties. I find that a move-in condition inspection report was in evidence, but the move out condition inspection report was never completed by the landlord. In any case, in this instance the landlord is not claiming damage, only the cost of cleaning.

With respect to the tenant's obligation to clean, section 37(2) of the Act states that, when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

I accept that the unit was not left reasonably clean by the tenant. However, without being presented with a completed move out condition inspection report and without being granted an opportunity to rectify deficiencies that would have otherwise been noted on the report, I find that the tenant cannot be held responsible for all of the resulting cleaning costs. I find that the landlord did not meet element 4 of the test for damages. Had the landlord mitigated by permitting the tenant to see a move out condition inspection report and to then address any noted deficiencies, this would have satisfied section 35 of the Act as well as element 4 of the test for damages..

With respect to the landlord's claim for loss of rent, the claim is contingent upon my finding that the tenant was in violation of the Act in some respect in order to satisfy element 2 of the test for damages Section 45 of the Act does permit a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that: **(a)** is not earlier than one month after the date the landlord receives the notice, and, **(b)** is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Section 52 of the Act states that in order to be effective, a notice to end a tenancy must be in writing and must **(a)** be signed and dated by the landlord or tenant giving the notice, **(b)** give the address of the rental unit, **(c)** state the effective date of the notice, **(d)** except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy, and **(e)** when given by a landlord, be in the approved form.

The tenant alleged that written notice was given on February 28, 2011. However, even if I accept that the tenant had personally delivered the notice to the landlord on February 28, 2011 as claimed by the tenant, I would still have to find that the notice in question did not comply with section 52 of the Act. Moreover, I find that the tenant did not vacate the unit until April 3, 2011, as confirmed in the signed note dated April 8, 2011.

Given the above, I find on a balance of probabilities, that the tenant failed to give adequate written notice to vacate and remained in possession of the unit until April 3, 2011. I find that this resulted in a loss of rent for the month of April 2011 in the amount of \$730.00 and a partial loss of rent for May 2011 in the amount of \$188.40 and the landlord is entitled to compensation of \$918.40.

Analysis: Tenant's Application

With respect to the tenant's claim for moving costs, I find that the tenant's decision to move was made without first exhausting the available remedies under the Act. The expectation is that a tenant who has an issue relating to a landlord's alleged failure to comply with the Act or the contract, should first make an application for dispute resolution seeking an order to force compliance before assigning liability to the landlord

and moving out. I do not accept the tenant's argument that the urgency of the situation prevented them from seeking the statutory remedy. In any case, I find that the claim failed to satisfy elements three and four of the test for damages.

Given the above, I find that the tenant's claim for \$200.00 in moving costs must be dismissed without leave.

I find that the landlord has established a total monetary claim of \$968.40 comprised of loss of rent and the \$50.00 fee paid by the landlord for this application. I order that the landlord retain the security deposit and interest of \$367.94 in partial satisfaction of the claim leaving a balance due of \$600.46.

Conclusion

Based on the testimony and evidence I hereby grant a monetary order in favour of the landlord for \$600.46. This decision is final and binding and the order must be served on the Respondent. If necessary, an application may be filed in the Supreme Court, (Small Claims), and enforced as an order of that Court.

The remainder of both the landlord's and the tenant's applications are dismissed without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: August 10, 2011.

Residential Tenancy Branch